Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

KENNETH L. WOODWORTH, PETITIONER

v.

RAYMOND EDWIN MABUS, SECRETARY,
UNITED STATES DEPARTMENT OF NAVY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or not an Agency can show by clear and convincing evidence that it did not retaliate against an employee under the Whistleblower Protection Act despite direct evidence that it considered an employee's protected disclosures prior to acting?

2. Whether the Whistleblower Protection Act mixed motive retaliation statutory scheme and precedent should mirror current Title VII mixed motive analysis?

3. Whether the Whistleblower Protection Act retaliation statutory scheme and precedence violates the First Amendment freedom of speech and has a chilling effect on whistleblowing activity?

4. Whether the Court of Appeals for the Federal Circuit's ruling failed to review the decision for substantial evidence, and whether such review was contrary to the holdings of this court?

5. Whether the Court of Appeals for the Federal Circuit's affirmation ruling, which relied on an credibility determination unsupported by substantial evidence, has created a split between the Federal Circuit and the Seventh Circuit?

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OPINION BELOW

The United States Court of Appeals for the Federal Circuit entered a Judgment Without Opinion affirming the decision of the United States Merit Systems Protection Board. The Merit Systems Protection Board's Initial Decision and Final Order are included herewith in the Appendix. The United States Court of Appeals for the Federal Circuit's Notice of Entry of Judgment without Opinion is included herewith in the Appendix. The order of the United States Court of Appeals for the Federal Circuit denying en banc review is included herewith in the Appendix.

JURISDICTION

The order of the Court of Appeals denial of a petition for rehearing en banc was entered on October 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

U.S. Const. Am. 1 - First Amendment of the Constitution of the United States of America

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

5 U.S.C. § 2302 - *Prohibited Personnel Practices* - Relevant provisions of the Whistleblower Protection Act of 1989.

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).
(2) For the purpose of this section--
(A) "personnel action" means--
(i) an appointment;
(ii) a promotion;
(iii) an action under chapter 75 of this title or other disciplinary or corrective action;
(iv) a detail, transfer, or reassignment;
(v) a reinstatement;
(vi) a restoration;
(vii) a reemployment;
(viii) a performance evaluation under chapter 43 of this title;
(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
(x) a decision to order psychiatric testing or examination; and
(xi) any other significant change in duties, responsibilities, or working conditions; with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority–

(1) discriminate against an employee or applicant based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences–

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail

to take, any personnel action against any employee or applicant for employment because of–

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

5 U.S.C. § 1214 - *Investigation of Prohibited Personnel Practices; Corrective Action* - Relevant Provisions

(b)(4)(A)The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, other than one described in section 2302(b)(8), has occurred, exists, or is to be taken.

(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against the

individual.
(ii) Corrective action under clause (i) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

5 U.S.C. § 1221 - *Individual Right of Action in Certain Reprisal Cases* - Relevant Provisions

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that--
(A) the official taking the personnel action knew of the disclosure; and
(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.
(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have

taken the same personnel action in the absence of such disclosure.

STATEMENT

The Petitioner, Mr. Kenneth L. Woodworth, has worked for the U.S. Department of the Navy (hereinafter "Agency" or "Navy") as an engineering technician, GS-12, from August, 1992, until the present. During the relevant time period, Mr. Woodworth worked at the U.S. Naval Ship Repair Facility (hereinafter "Repair Facility"), in Yokosuka, Japan, as an engineering technician. Mr. Woodworth's duties included servicing the Vertical Launching System (hereinafter "VLS") that are located on naval vessels. In or around 2000, Mr. Woodworth became aware that technicians, like himself, were being exposed to missile warhead blast residue that was being discharged during the servicing and maintenance of the VLS. Further, the missile warhead blast residue, which is composed of chemical elements and heavy metal compounds, has been determined to be harmful, caustic, toxic, irritating and carcinogenic. Moreover, Mr. Woodworth discovered that these substances had been shown to cause cancer and to be otherwise life threatening.

After Mr. Woodworth learned of the harmful effect of the missile warhead blast residue, he became concerned that the Agency was not providing any cleanup, protection or any training regarding these hazardous materials, and thus, subjecting the Agency's employees and the public to a substantial risk to their health and safety.

Mr. Woodworth made relevant protected disclosures, among others, on or about June 27, 2000 and/or July 27, 2000, when he informed the commanding officer that workers who disassembled missiles were exposed to missile warhead blast residue, a complaint he made at least six (6) times in an effort to have the issue remedied. Mr. Woodworth also requested hazardous duty pay, which authorizes hazardous duty pay for exposure to missile warhead blast residue, a respirator, training, and clean-up of the hazardous missile warhead blast residue, to Mr. Peter Rita and the industrial hygienist, Lieutenant Harold E. Burke, and Commander David S. Horne. During this time period, Mr. Woodworth's first line or immediate supervisor was Mr. Ed Krueger, and Mr. Woodworth's second line supervisor was Mr. Rita. As a result of his disclosures, and his request for hazardous duty pay, the Agency received negative newspaper press and also stood in a position to pay out tens of thousands of dollars in back pay and interest to Mr. Woodworth, an amount that stood to balloon substantially to include other similarly situated employees, if the precedence for such payment was set.

After his disclosure, Mr. Woodworth averred that he was subjected to a hostile work environment, which manifested in a number of harassing activities, such as the posting of derogatory pictures, and even death threats being lodged against him. During the same time period, Mr. Woodworth's overseas tour was concluding, and he required an extension to continue working at the Repair Facility in Japan. In or around October, 2000, Mr. Woodworth inquired if Agency would be extending his tour of duty, when Mr. Krueger advised Mr. Woodworth that the Agency would not be

extending his tour of duty. At the same time, Mr. Woodworth also made a written inquiry to Mr. Rita regarding the extension of his overseas tour; however, Mr. Rita never responded.

The Agency made its decision not to extend Mr. Woodworth's tour of duty during a Position Management Board meeting that occurred on or about October 16, 2000. This was shown by a memorandum that was produced and identified that there were discussions regarding the employees whose tours of duty were set to expire.

On December 14, 2000, Mr. Rita sent an electronic mail message to Captain Douglas with the subject line of "Extension of Mr. Woodworth." Mr. Rita stated:

> You will receive the package regarding Ken Woodworth's extension this morning. As we discussed earlier, I have recommended against offering him an extension. Based upon comments the C/O made to me earlier, to wit, "Just because he's annoying isn't justification for not extending him." I think you need to know all our reasons because I am sure we'll have several discussion on this in the future.
>
> (1) At the completion of this tour, Ken will have been here 9 years. That is nowhere near the record, but it is a long time to be concentrating on only a few ships. Back at Port Hueneme he will have greater exposure to ships and problems and have greater opportunities to enhance his professional skills. That, I think,

would be good for him. Conversely, SRF would benefit from having a new VLS Tech who has been working on a large number of ships and seen more problems.

(2) Ken is not happy here. No matter what he says, no matter what spin he puts on it, his actions tell the tale. In my experience, the types of complaints that Ken makes are invariably based upon a pretty negative outlook either professional or personal. I am sure he feels he was unjustly denied a promotion and that has colored his perspective. For 8 years, Ken worked in the same office environment, but suddenly air quality is an issue? Why now? He claimed it was terrible that Ed Krueger was running a football pool, but Ken participated in it for years. Suddenly it is an issue. Why? Even though the Safety Center, Yokosuka Hospital et al have said missile blast residue isn't a hazard, Ken won't let it go. He won't wear PPE (I've offered 3 times) and feels he should be getting hazardous duty pay. Nothing we do, no fact, no science, will convince him otherwise. Why? There are just some examples, but my conclusion is that he is sharing his "pain", and will continue to do so. It is a distraction for him, for the Department, and for me that might be resolved in a new location.

(3) Ken has had and continues to have a deleterious affect [sic] on morale and working environment in Code 190. Based on conversation I have had with C190 folk, if we had a vote by his coworkers, we would get only 1 vote, and that

from Mr. Munoz, to retain him. He had some valid issues which we could have resolved differently in a climate of communication and compromise. Ken chose to use the grievance system forcing me to take precipitous and sometimes heavy handed action to protect the command. We are a small group and you can't keep secrets here. They know why I took the action I did and who instigated it. They resent him for it and I and my Division Heads have expended a lot of time and energy to ensure that Ken not be subjected to hostility because of it. Fortunately, we have a lot of good people here and there hasn't been anything done by anyone to further inflame the situation. But the resentment is still there and will remain as long as Ken is here.

(4) I have it on good authority that Pt. Hueneme will not extend Ken's return rights again. HOWEVER, and this is very important, we will not be able to ask them until AFTER we make a decision on extending him or not. I am not wiling to take the risk of having Ken on PPP and having another Munoz situation. I do not want to have another difficult situation that could go on indefinitely and I see no possibility of any resolution of Ken's angst short of promoting him to a GS-13. That is not in the cards.

(5) I received 2 packages for extension, one was Ken's, the other was Greg Andreoni. At my weekly Division Head meeting, I asked all to vote on the extensions. They unanimously support retaining Greg and not retaining Ken.

> Assuming both Ed's vote and mine to be void (Hey, we are only human and ED and I carry the admin burden), that still is a 3/2 majority against extending Ken and none of thoses [sic] votes have to deal with the direct problems, just the fallout. That in itself should be a strong indicator of our course of action.
>
> I think that pretty well sums it up. I sincerely feel it would not be in our best interest to extend Ken. We have no obligation to do so. If we do not make the offer, Ken cannot grieve it. I expect he will try and make a case that it is some form of reprisal and he is protected under the "Whistle Blower" act, however, it won't wash. Ken's grievances were not whistle blowing as he did not address illegal acts and the majority of his complaints were unfounded anyway. Management exercising it's [sic] rights cannot be construed as reprisal as it isn't "punitive". We do not have to justify our decision and I am prepared for the repercussions with Ken as a result of this decision.

Mr. Rita was also designated by Captain Armstrong as the investigating official for Mr. Woodworth's whistleblower grievances.

Mr. Woodworth avers that the decision not to extend his overseas duty was the direct result of his whistleblowing activity, since he identified the substantial and specific danger to public health or safety for those exposed to the missile warhead blast residue.

The Initial Decision of the Merit Systems Protection Board (hereinafter "MSPB" or "Board") held that the Agency's decision would have been the same even absent the Petitioner's whistleblowing activity and stated that the decision had no link with the activity. The Initial Decision stated that the evidence reflected that Mr. Woodworth was influenced by factors, other than his conversation with Mr. Krueger, in deciding to exercise his return rights, such as his entitlement to on-base housing, which was scheduled to expire in April of 2001, his son's graduation from a local high school in June of 2001, and doubt as to whether Port Hueneme would grant another extension of his return rights to his former position in the United States Navy. The Initial Decision stated that the Agency showed clear and convincing evidence that Captain Armstrong's decision to not offer Mr. Woodworth another tour extension would have been the same regardless of his protected activity. In support of this finding, the Initial Decision used a credibility determination that the Agency's testimony was more credible than that of Mr. Woodworth.

The full panel of the MSPB affirmed the Initial Decision. The United States Court of Appeals for the Federal Circuit (hereinafter "Federal Circuit") affirmed and entered a judgment without an opinion pursuant to Rule 36.

REASONS FOR GRANTING THE PETITION

I. THE RULING THAT THE AGENCY'S DECISION WOULD HAVE BEEN THE SAME, EVEN ABSENT A COMPLAINT REGARDING A SUBSTANTIAL NATIONAL INTEREST, TO WIT: THE DANGER OF WARHEAD MISSILE RESIDUE, IS EITHER CONTRARY TO THE RELEVANT LAW OR PRESENTS A NOVEL QUESTION OF LAW.

The purpose of the Whistleblowers' Protection Act (hereinafter "WPA" or "the Act") is to shield employees who are willing to speak out and criticize government management and to "freely encourage employees to disclose that which is wrong with our government." Marano v. Dept. of Justice, 2 F.3d 1137, 1142 (Fed. Cir.1993). Pursuant to 5 U.S.C. § 1221(e)(1):

> [An] employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that (A) the official taking the personnel action knew of the disclosure; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

5 U.S.C. § 1221(e)(1). If the employee is successful, the burden shifts to the Agency to demonstrate, by clear and convincing evidence that it would have taken the same action, absent the protected activity. Id.

The legislative history of the WPA demonstrates that the purpose of the Act is to encourage whistleblowing by federal employees and to *protect their careers from retaliation when they make protected disclosures.* See, e.g., S. Rep. No. 95-969, at 8, 18, 21-22 (1978); Alferos v. Office of Personnel Management, 20 Fed. Appx. 872 (Fed. Cir.2001). As explained in the legislative history of the WPA:

> In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses.

See S. Rep. No. 95-969, 95th Cong., 2d Sess. 8 (1978), reprinted in 1978 U.S.C.C.A.N. 2730.

The WPA of 1989 amended this language to broaden the scope of disclosures covered by the WPA from "a disclosure" to "any disclosure." Pub. L. No. 101-12, § 4(a)(3), 103 Stat. 32. The 1989 amendments thereby substantially reduced a whistleblower's burden to establish his case, and sent "a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing." 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20).

The legislative history of the WPA acknowledges that direct evidence of retaliation would

be "rare." S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988). "[S]upervisors do not usually write down or tell other employees of their intent to take prohibited reprisal against an employee." Id. In light of the WPA's modifications to the Civil Service Reform Act, it is evident that a whistleblower need not demonstrate a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action: "Regardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing." Hathaway v. Merit Systems Protection Bd., 981 F.2d 1237 (Fed. Cir.1992) (citing S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988) (accompanying S. 508)).

The case at bar presents a very rare situation where there is direct evidence of retaliation taken against Mr. Woodworth in response to his complaint regarding a disclosure that was of a national interest: the email from Mr. Rita dated December 14, 2000, (hereinafter "the Rita email, *supra*").

A. The Federal Circuit upheld a decision erroneously based on the conclusion that the Petitioner exercised his return rights prior to the Agency's decision.

The Initial Decision in this case is based on the assertion that Mr. Woodworth made the Agency aware that he had intended to exercise his return rights *prior* to the Agency effecting the decision not to extend his overseas tour (hereinafter "tour"). In this way, the administrative judge (hereinafter "ALJ") decided that

the Agency's denial of Mr. Woodworth's request for an extension of his tour was not retaliation for his whistleblower disclosures. This assertion is clearly erroneous and not supported by the record.

The direct evidence establishes that the decision not to extend Mr. Woodworth's tour was made prior to December 14, 2000. The Rita email, *supra*, establishes that the Agency made its determination prior to Mr. Woodworth's even considering any alternatives. Mr. Rita specifically stated in his email, *supra* that there were previous discussions regarding Mr. Woodworth's tour, and Mr. Rita "[had] it on good authority that Pt. Hueneme [would] not extend Ken's return rights again." Thus, Mr. Woodworth's assertion that he was informed by management that his tour would not be extended on or about October, 2000, is reasonable, when read in conjunction with the evidence. Mr. Woodworth did not raise any issue regarding his return rights until December 18, 2000, after he had already been told verbally that his tour would not be extended. Thus, the ALJ's ruling, which held that Mr. Woodworth's notice to the Agency that he would be exercising his return rights preceded the Agency's decision not extend his tour, was erroneous.

The Federal Circuit upheld the Board's decision and final order. Among other reasons, this is incorrect because Captain Armstrong testified at the hearing that at the time the decision not to extend the tour was made, he did not know whether Port Hueneme would or would not extend Mr. Woodworth's return rights. The decision from Port Hueneme to extend Mr. Woodworth's return rights was not made until January 25, 2001. Therefore, whether or not Port Hueneme was

going to extend Mr. Woodworth's return rights, which it did, could not have been a factor that the Agency relied upon in making its decision to decline an extension of his tour.

B. The Federal Circuit upheld a decision, which fails to analyze whether the same Agency action would have taken place without Petitioner's whistleblower disclosures, that is contrary to the established precedence on this matter and gives rise to a novel question of law.

When determining whether the same agency action would have taken place without the whistleblowing disclosures, the Board in Geyer v. Department of Justice, 70 M.S.P.R. 682, 688 (1996), aff'd , 116 F.3d 1497 (Fed. Cir.1997), identified factors that may be considered, including (1) the strength of the agency's reason for the personnel action excluding the whistleblowing, (2) the strength of any motive to retaliate for the whistleblowing, and (3) any evidence of similar action against similarly situated employees for the non-whistleblowing aspect alone. Greenspan v. Dept. of Veterans Affairs, 464 F.3d 1297, 1303 (Fed. Cir.2006). See also Carr v. Soc. Sec. Admin., 185 F.3d 1318, 1323 (Fed. Cir.1999) (approving use of the Geyer test in "determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing").

The Agency's alleged reason for not extending Mr. Woodworth's tour directly conflicts with the testimony and evidence. The decision not to extend Mr.

Woodworth's tour was made and communicated to him before he began to consider any other options. Mr. Woodworth raised issues concerning a substantial national interest when he complained about the missile warhead blast residue. It is evident that this issue struck a chord with the Agency, and as such the Agency decided it needed to retaliate against Mr. Woodworth by removing him from the facility. This plan was set forth in the Rita email, *supra*, in which Mr. Rita presented his plan of action for retaliating against Mr. Woodworth.

The Agency's argument is one of convenience, which it established *post facto* to explain its actions. Moreover, there was no legitimate reason for refusing to offer Mr. Woodworth an extension. Mr. Woodworth was performing his duties adequately and there was no indication that he would not be offered an additional extension, absent the whistleblowing activity. Thus, the strength of the agency's reason for the personnel action can not support the assertion that the Agency would have taken the action regardless of Mr. Woodworth's protected activity. Moreover, the evidence as well as the witnesses' testimony conclusively establishes that the Agency harbored a significant motive to retaliate against Mr. Woodworth for his disclosures. Mr. Woodworth and the Agency had a strained relationship in that Mr. Woodworth had complained about the missile warhead blast residue in connection with matters such as being subjected to a hostile work environment, his office air quality, being forced by Mr. Rita to attend a non-essential evacuation drill, complaints about Mr. Krueger, Mr. Cairney, Mr. Rita's making death threats against him, and complaints about individuals receiving non-competitive

promotions. Mr. Woodworth lodged his complaints about the missile warhead blast residue, which yielded affirmative results from testing. A subsequent investigation revealed that his complaints were valid because missile warhead blast residue was found in local water samples. Additionally, pursuant to the Occupational Safety and Health Administration (hereinafter "OSHA") Report dated October 11, 2005, the Department of the Navy and OSHA entered into an informal settlement pursuant to the citations that were issued for unsafe or unhealthy working conditions, as a result of Mr. Woodworth's complaint concerning missile warhead blast residue. Further, the Agency made changes to its VLS technical manual, as of October, 2005, and began issuing its HAZCOM training CD disk as of June, 2006, all as a result of Mr. Woodworth's disclosures concerning missile warhead blast residue.

The Agency also exhibited its retaliatory motive against Mr. Woodworth in the Rita email, *supra*, in which it actually assessed the WPA claim that Mr. Woodworth would have against the Agency. The Agency admits to retaliating against Mr. Woodworth in the Rita email, *supra*. Mr. Rita, however, believed that not extending Mr. Woodworth's tour would not produce a cognizable retaliation claim under the WPA. This clear and overt statement of concern about a potential WPA claim establishes that the Agency was in fact motivated by Mr. Woodworth's protected activity. Mr. Rita considered, strategized, and conspired to retaliate and take adverse action against Mr. Woodworth as a direct result of his whistleblower disclosure. Thus, the Agency's actions were motivated by Mr. Woodworths' disclosures. The responsible management officials'

scienter in their retaliatory actions is proven by the Rita email, *supra*.

It is well established that "[t]he purpose of the [WPA] is to shield employees who are willing to speak out and criticize government management, to 'freely encourage employees to disclose that which is wrong with our government.'" Greenspan, *supra*; *citing* Marano, *supra*. "The WPA by its terms includes and protects 'any' disclosure that an employee 'reasonably believes' evidences misconduct or mismanagement." Id.; *citing* 5 U.S.C. § 2302(b)(8)(A). "When the disclosure is protected the burden is on the agency to show, by clear and convincing evidence, that it would have disciplined the employee for reasons unrelated to the protected disclosure." Id. The agency must establish that it would have taken the same personnel action in the absence of the protected disclosure. Briley v. National Archives and Records Admin., 236 F.3d 1373, 1378 (Fed. Cir.2001).

The Federal Circuit upheld the MSPB's decision , thereby circumventing the WPA's stated purposes, and giving rise to a new question of law. The Federal Circuit upheld the Board's ruling, when clear and convincing evidence did not establish that the Agency would have taken the same action regardless of Mr. Woodworth's disclosures. Indeed, in all relevant communications, Mr. Woodworth's disclosure was mentioned frequently and was evidently a factor in the responsible management officials' consideration. Nevertheless, the Board failed to properly consider whether the Agency action would have taken place absent the protected disclosure. Id. Thus, the Federal Circuit's ruling creates a precedential situation where

management officials, who are patently strategizing so that they may avoid WPA claims while taking a personnel action against an employee, are determined to have not taken the action in retaliation for the employee's protected disclosures. This ruling is contrary to the intent behind the WPA's provisions, and contrary to the established precedent that states that "the burden is on the agency to show... that it would have disciplined the employee for reasons unrelated to the protected disclosure." Greenspan, *supra*.

This produces a novel question of law previously unaddressed by this court or the Federal Circuit. What result occurs when there is clear, direct evidence that the responsible management officials intended to pursue a personnel action against an employee for his disclosures, in part because of his disclosures, while conspiring to avoid his WPA claims? In the ruling below, the Agency was permitted do precisely this act. The evidentiary precedent in Marano requires the Agency to show by "clear and convincing evidence" that it would have taken the same action regardless of the employee's protected disclosure. Marano *supra*. When the Agency strategizes about avoiding liability under the WPA when deciding to take a personnel action, the Agency's action is inextricably influenced by the employee's whistleblower disclosure. This is a necessary part of the human decision making process, as the Agency's awareness of the disclosure is invoked within the decision making process. This result is also unavoidable because if management had believed that their actions may have violated Mr. Woodworth's whistleblower rights, this would have influenced their subsequent actions. So, the belief by Mr. Rita that

their actions did not violate Mr. Woodworth's rights necessarily influenced their decision to maintain course. Allowing the Agency to take such an action, in spite of direct evidence implicating its retaliatory animus, cuts directly in opposition to both the statutory intent of the WPA and the precedent requiring the Agency to show by clear and convincing evidence, that its actions or inactions would have been the same in the absence of the whistleblower's disclosure. Id.; 5 U.S.C. § 2302(b) *et seq.* The Federal Circuit's case law on this matter has a chilling effect upon the protection of whistleblowing activity, which indeed defeats the purpose of the WPA. Any prudent federal employee will be reluctant to make a protected disclosure if that employee reads Mr. Woodworth's case file.

This issue must be resolved because under the current precedent, the likelihood that an Agency can take prohibited personnel practices and do so openly in direct violation of the WPA is evident, and the potential for abuse is great. A determination on this issue of law is required to clarify the proper application of the WPA and the implications of the precedent requiring "clear and convincing evidence, that [the Agency] would have disciplined the employee for reasons unrelated to the protected disclosure." Marano, *supra.* Therefore, review of the previous appeal is necessary.

II. THE FEDERAL CIRCUIT'S AFFIRMATION UPHELD A DECISION BASED ON LAW CONTRARY TO THIS COURT'S RECENT RULINGS ON VARIOUS MIXED MOTIVE RETALIATION CASES, PRODUCING A NOVEL QUESTION OF WHETHER THE WHISTLEBLOWER PROTECTION ACT RETALIATION LAW SHOULD MIRROR TITLE VII RETALIATION PRECEDENT.

A. The Federal Circuit's WPA law runs astray of this Court's mixed motive case law, and the law should mirror this Court's Title VII mixed motive analysis by finding retaliation if the Agency's actions might have dissuaded a reasonable worker from blowing the whistle.

In matters involving "mixed motives" for an employer's disciplinary actions, this Court has recognized that for both the WPA, its associated First Amendment protections, and Title VII, the analysis of "mixed motive" employer actions should involve a pretext inquiry into the decision maker's intent, stating that "the Court considers 'pretext' analysis sufficient in many... areas." Waters v. Churchill 511 U.S. 661, 690-691, (1994) (plurality opinion) (Scalia, J., concurring); Patterson v. McLean Credit Union, 491 U.S. 164, 187-188 (1989) (employment discrimination suit under 42 U.S.C. § 1981); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 895-896, n. 6 (1984) (unfair labor practice suit under the National Labor Relations Act); Geduldig v. Aiello, 417 U.S. 484, 496-497, n. 20 (1974) (Equal Protection Clause sex-discrimination claim against legislation); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-805 (1973) (discrimination claim under Title VII). Additionally,

the present case involves a similar mixed motive analysis, where the Agency's knowledge of Mr. Woodworth's protected disclosures are inextricably tied with the Agency's actions. Title VII and the WPA both provide important functions for protecting constitutional rights, wherein Title VII preserves constitutionally protected demographic groups and the WPA preserves constitutionally protected speech in the federal sector. Indeed, it is acknowledged that the WPA "give[s] additional protections to... employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system." Waters, *supra*; *citing* e.g., Whistleblower Protection Act of 1989; U.S. Const. am. 1. In this way, the use of a pretext inquiry has long been a hallmark of this Court's analysis when protecting similar constitutional rights. Waters, *supra*. Additionally, Congress drafted provisions of the WPA that are aimed at protecting employees from unlawful discrimination in a similar manner as Title VII, stating that it is it is a prohibited personnel practice to "discriminate against an employee or applicant based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation." 5 U.S.C. § 2302(b)(1). As such, Congress has recognized the importance of protecting not only whistleblower activity, but that certain prohibited personnel practices taken in retaliation for whistleblowing can be tied to base Constitutional rights above and beyond the First Amendment right to freedom of speech that must also be protected. Id.; U.S. Const. am. 1.

The WPA provides that in cases involving "mixed motives" with allegations of retaliation for whistleblowing, the Agency must establish that it would have taken the same personnel action in the absence of the protected disclosure. Briley, *supra*; Marano, *supra*; see also 5 U.S.C.§ 1214(b)(4)(B)(ii); 5 U.S.C. §1221(e)(2). Thus, the Federal Circuit has held that in pretext and mixed motive analysis, the Agency need merely defeat a "but-for" argument that it would not have taken the action or inaction at issue but for the employee's protected disclosure. Marano, *supra*. In stark contrast, this Court has held recently that in Title VII pretext and mixed motive retaliation cases that the Plaintiff must "show that the challenged action well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination'" to show that a particular action by an employer was retaliation. Burlington No. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006); *quoting* Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006); *quoting* Washington v. Illinois Dept. of Revenue, 420 F.3d 658, 662 (7th Cir. 2005). As argued above, the prior precedence regarding mixed motive pretext inquiries demonstrates that there is a link between the methods both Congress and the Courts have employed to protect constitutional freedoms from adverse employer actions. However, these two precedents, both Briley and Burlington, create a situation where analysis of mixed motive government actions under the WPA, an act designed to protect constitutional rights including both speech and equal protection, necessarily contradicts this Court's analysis of Title VII constitutional and statutory protections.

The Federal Circuit's case law for the WPA allows an Agency employer to take personnel actions against an employee with full knowledge that such actions may dissuade whistleblowing activity and the freedom of speech, as long as the Agency would have done so absent the employee's disclosure. Briley, *supra*. However, this directly contradicts the court's pretext analysis in Burlington in Title VII retaliation cases, which takes the appropriate stance in finding retaliation if the Agency's actions could dissuade a reasonable employee from engaging in the protected conduct. Burlington, *supra*. Given the ties between the protective function and purpose of both Title VII and the WPA, and given that the prohibited personnel practice statutes themselves provide for protections against discrimination, there is a link between both discrimination and whistleblower retaliation claims. Thus, legal analysis of the WPA should mirror legal analysis of Title VII in mixed motive retaliation cases. Since, the Federal Circuit's case law runs astray of this Court's rulings, the current case law protects a rift in the protection of constitutional rights, statutorily protected activities, and the two must be reconciled. The WPA's retaliation analysis should mirror the same analysis espoused in Burlington, and the standards must be the same.

Applying this theory to the issue at bar, it is evident that the Court would reach a different result. As such, if the Petitioner demonstrated that he had direct evidence of retaliation, then it would be impossible to reach any other conclusions other than the conclusion that the Petitioner was subjected to retaliation.

B. The Federal Circuit's WPA analysis should require the Agency to disprove or impeach direct evidence of retaliation against it, similar to Title VII cases involving direct evidence of discrimination.

The analysis of evidence in summary judgment Title VII cases for the purposes of summary judgment hinges upon whether there is direct evidence of discrimination. When there is no direct evidence of discrimination, McDonnell Douglas and its progeny espouse that a plaintiff must satisfy the three-part evidentiary scheme , and establish that 1) he or she belongs to a protected group, 2) he or she suffered an adverse employment action, and 3) there is some evidence in the record supports the inference of improper motivation. McDonnell Douglas, *supra*. If the plaintiff is successful in doing so, an inference of discrimination arises and the burden shifts to the Agency to articulate a legitimate, non-discriminatory explanation for its action. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has articulated such a reason, the question becomes whether the proffered explanation was the true reason for the Agency's action, or merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993). In this way, the burden shifts to the Agency to establish a legitimate management purpose for its actions in situations lacking direct evidence of discrimination. Texas Dept. of Community Affairs, *supra*. However, in cases involving direct evidence of discrimination, this burden shifting analysis does *not* apply, and the burden is on the plaintiff to establish his or her case by preponderant evidence and

for the Agency to disprove, impeach, or discredit such direct evidence in defense of its actions.

The WPA contains a similar burden shifting structure that applies when there is direct evidence of retaliation and where there is no direct evidence of retaliation. Once the whistleblower establishes their prima facie case, the Agency must merely defeat a "but-for" argument that it would not have taken the action or inaction at issue but for the employee's protected disclosure, as argued above. Marano, *supra.*; Briley, *supra.* In essence, this burden structure is analogous to the Title VII indirect evidence scenario, where the Agency must show a legitimate management purpose for its actions. However, unlike the Title VII direct evidence scenario, the Agency need not directly disprove the direct evidence of its retaliation. Under the WPA, the Agency may retaliate against an employee for his or her protected disclosures without refuting or impeaching the direct evidence retaliatory animus, so long as the Agency produces sufficient legitimate reasons for its actions Id. In Mr. Woodworth's case, there was direct evidence of retaliation against him that the Agency never had to disprove or discredit it. This runs counter to the legislative purposes of the WPA, and produces a chilling effect upon whistleblowing activity. The proper analysis, which would provide for effective protection of whistleblowers, would be to require the Agency to disprove or discredit the direct evidence of its retaliation, similar to cases involving direct evidence of discrimination under Title VII. Given the ties between the protective function and purpose of both Title VII and the WPA, and given the links between the two statutes as argued above, the WPA's burden

shifting analysis should also mirror Title VII's analysis in mixed motive retaliation cases.

Since the Federal Circuit's case law runs astray of this Court's rulings, the current case law produces a rift in the protection of constitutional rights, statutorily protected activities, and the two must be reconciled. For these reasons, the WPA's retaliation analysis should incorporate the same mixed motive analysis espoused in Burlington, as argued above, and the burden shifting analysis of the WPA should not apply in cases involving direct evidence of retaliation, requiring the Agency to disprove or impeach the direct evidence of its retaliation.

III. THE DECISION BELOW UPHOLDS A STATUTORY SCHEME AND ANALYSIS THAT IS VIOLATIVE OF THE FIRST AMENDMENT AND HAS A CHILLING EFFECT ON FIRST AMENDMENT PROTECTED SPEECH AND WHISTLEBLOWING ACTIVITY.

The "[s]tate cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." Connick v. Myers, 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." Garcetti v. Ceballos, 547 U.S. 410, 418 (2006); *citing* Waters, *supra* at 671 (1994). "At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen." Id. "The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties

employees enjoy in their capacities as private citizens." Id., at 419; *citing* Perry v. Sindermann, 408 U.S. 593, 597 (1972). "We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties... [o]ur precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job." Id. at 426.

As for the Whistleblower Protect Act, "federal employees have been held to be unprotected for statements made in connection with normal employment duties... the very speech that the majority says will be covered by "the powerful network of legislative enactments ... available to those who seek to expose wrongdoing." Id. at 441 (Souter, J., Steven, J., and Ginsburg, J. dissenting) (citations omitted). As such, this Court has recognized that the WPA inherently involves a first amendment right for statements made outside normal employment duties. Huffman v. Office of Personnel Management, 263 F.3d 1341, 1352 (Fed. Cir. 2001); Garcetti, *supra*, and at 426. The analysis of whether there was a violation of the WPA and of an employee's first amendment rights falls first upon whether the disclosure was a protected disclosure outside the employee's normal duties, and second upon the motivation of the supervisors involved. Greenspan, *supra*; *citing* 5 U.S.C. § 2302(b)(8)(A); Briley, *supra*. Given that the WPA seeks to protect statements outside an employee's normal duties that disclose wrongdoing, and that the mixed motive analysis of the WPA is central to determining the reasons and impact of a management officials' actions against an employee, the mixed motive analysis at issue

has important implications for an employee's protected first amendment speech and the effects of government action thereupon.

As argued above, this Court has recognized in various other areas of law involving mixed motives and constitutional protections, that the analysis of "mixed motive" employer actions should involve a pretext inquiry into the decision maker's intent, and that "the Court considers 'pretext' analysis sufficient in many... areas." Waters, *supra* at 690-691, (1994) (Scalia, J., concurring) (citations omitted). Title VII's mixed motive analysis examines whether the action might have "'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Burlington, *supra* at 68 (2006) (citations omitted). However, the WPA's analysis of mixed motives in the context of whistleblower retaliation is more restrictive to the employee's constitutional rights; "the burden is on the agency to show, by clear and convincing evidence, that it would have disciplined the employee for reasons unrelated to the protected disclosure." Marano, *supra*. Thus, the Federal Circuit has held that in pretext and mixed motive analysis, the Agency need merely defeat a "but-for" argument that it would not have taken the action or inaction at issue but for the employee's protected disclosure. Marano, *supra*.

Essentially, the Federal Circuit's WPA precedent allows an agency to take personnel actions against an employee knowing that it may dissuade whistleblowing speech, so as long as the agency intended to take this action absent the disclosures. Briley, *supra*. This hypothetical analysis of an agency's possible actions authorized by both statute and

precedent is more restrictive to speech than the pretext analysis employed in other areas of law involving constitutional rights. Under the WPA, the action is permissible as long as the Agency would have taken the same action absent the protected disclosure, regardless of the effect that such action would have on dissuading whistleblowing speech. Id.; Burlington, *supra.*

When the Agency strategizes about how to avoid liability under the WPA in making its decision in a personnel action, as is what happened in Mr. Woodworth's case, the Agency's action or inaction is inextricably influenced by the employee's whistleblower disclosure, as argued above. It is also worth noting that the MSPB ruled that Mr. Woodworth's disclosures were protected disclosures, were not pursuant to his official duties as an employee of the federal government, and were thus protected by the first amendment. Huffman, *supra.* The end result, as it was in Mr. Woodworth's case, is a legal loophole allowing for the Agency to take a retaliatory action that affected his first amendment rights. Garcetti, *supra.* Therefore, the current precedent and the WPA's pretext analysis violated Mr. Woodworth's first amendment right to freedom of speech through its mixed motive pretext analysis.

If the Agency is permitted, as it was in Mr. Woodworth's case, to consider the strengths of a subordinates' potential whistleblower claims when deciding whether its actions could violate the whistleblower's rights, then it violates the legislative intent behind the WPA as described above. It also produces a chilling effect upon future whistleblowing

activity that is compounded by the fact that management may openly conspire to thwart the statute's purposes. The result of the Federal Circuit's affirmation below creates a slippery slope of potential future violation of first amendment rights through careful and cunning planning on the part of management. For these reasons, Mr. Woodworth's appeal should be remanded, and the mixed motive analysis of the WPA be found unconstitutional, as violative of the first amendment, and should be overturned.

IV. THE COURT OF APPEALS' RULING FAILED TO REVIEW THE DECISION FOR SUBSTANTIAL EVIDENCE, WHICH IS CONTRARY TO THE HOLDINGS OF THIS COURT.

This Court has similarly expounded briefly upon the statutory of standard of review, stating that "[t]he Federal Circuit's statutory review of the substance of Board decisions is limited to determining whether they are unsupported by substantial evidence or are "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" U.S. Postal Service v. Gregory, 534 U.S. 1, 6-7 (2001); *citing* 5 U.S.C. § 7703(c). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951). Substantial evidence does "'more than create a suspicion of the existence of the fact to be established... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.'" Id.; *citing* NLRB v.

Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939).

This Court has also likened the Federal Circuit's review standard to its counterpart in the Administrative Procedure Act, an analysis which is appropriately appositive considering the Board's function as a review body for Agency actions, by analyzing the scope of review under the arbitrary and capricious standard. U.S. Postal Service v. Gregory *supra*; *citing* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); 5 U.S.C. § 706(2). Additionally, this court has recognized that the limited lens through which the Federal Circuit may wield its review powers over Board decisions by noting that "[i]t is not for the Federal Circuit to substitute its own judgment for that of the Board." Id.; *citing* Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983). "The role of judicial review is only to ascertain if the Board has met the minimum standards set forth in the statute." Id. Nevertheless, this court has firmly held that a judge may not "insulate his findings from review by denominating them credibility determination, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. " Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575 (1985). "Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." Id. "Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination." Id.

In this matter, it is clear that there is direct evidence that contradicted the Agency's witnesses' story. There is undisputed evidence that the decision not to offer an additional tour of duty to Mr. Woodworth was made prior to December, 2000. The process of extending an employee's tour of duty was normally begun six (6) to eight (8) months in advance of the end of the employee's tour of duty. In December, 2000, the Rita email *supra* discussed Mr. Woodworth's whistleblower activity and a decision not extend his tour of duty. The Rita email, *supra* also indicated that the Agency had discussed Mr. Woodworth's return rights with the Division Heads and further discussed the issue during an October, 2000 Position Management Board meeting.

The Agency finally offered Mr. Woodworth the options of retiring, resigning, or returning to California, in a letter March, 2001. This choice could in no way be construed as being in concert with Mr. Woodworth's wishes, which the Agency had asserted during testimony. Mr. Woodworth testified that he wanted his job in Japan to be restored, back pay, benefits and to be made whole again, a request that directly conflicts with the Agency's assertion that he wanted to exercise his return rights.

Despite all of this evidence, the Board determined that Mr. Woodworth's testimony was not credible in his assertion that he did not exercise his return rights prior to December, 2000. Instead the ALJ determined that other factors in Mr. Woodworth's life, such as his son's graduation from highschool, had a bearing on his credibility, despite there being *no* supporting evidence of these factors in the record. In

this way, the ALJ clearly manufactured a credibility determination to insulate his ruling.

The ALJ failed to properly weigh and consider the direct and objective evidence in the record, and instead rested the entire case upon credibility. The ALJ's ruling was contrary to the direct evidence in the case, namely, the Rita email, *supra*, which confirmed the Agency's awareness of the Mr. Woodworth's potential whistleblower retaliation claim and its belief in how it could defeat or circumvent this claim. Given the existence of the Rita email, *supra*, there was no relevant evidence in the case that a reasonable mind might accept as adequate to support the conclusion that Mr. Woodworth was not credible in his assertion that he did not exercise his return rights prior to December, 2000. Universal Camera Corp. v. NLRB, *supra*. This direct evidence contradicting the Agency's witnesses' story supports a determination that the Judge's credibility finding was erroneous and unsupported by law. At the very least, the direct evidence at bar in this case contradicted the Agency witnesses' story. Anderson v. City of Bessemer City, N.C., *supra*. Additionally, the overall story by the Agency that it was not retaliating against Mr. Woodworth in not extending his tour of duty is so "internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." Id.

Given that the direct evidence did not support the conclusion that Mr. Woodworth's protected disclosures were not contributing factors in the Agency's personnel action against him, and that the evidence in the case contradicted the Agency witness' testimony, a finding of clear error by the Federal

Circuit was necessary in this situation. Id.; Universal Camera Corp. v. NLRB, *supra*. Regardless of this evidence, the Federal Circuit upheld the Board's ruling, without an opinion, which operates as an affirmation of the lower court's decision. Fed. Cir. L.R. 36. As such, the ruling runs afoul of Anderson and Universal Camera Corp. and merits reversal by this court.

V. THE COURT OF APPEALS' RULING FAILED TO REVIEW THE DECISION FOR SUBSTANTIAL EVIDENCE, WHICH HAS CREATED A SPLIT IN THE CIRCUITS.

The issuance of a decision without an opinion under Federal Circuit Local Rule 36 results in affirmation of the MSPB's ruling below, and the MSPB's decision may be relied upon as precedential by the Board in future whistleblower decisions. Fed. Cir. L.R. 36. Furthermore, the Federal Circuit has held that "[w]here two inferences are possible, we cannot substitute our own inference for that of the Board, so long as the Board's is supported by substantial evidence in the record as a whole. National Labor Relations Board v. Augusta Bakery Corp., 957 F.2d 1467, 1473 (Fed. Cir. 1992). The Seventh Circuit Court of Appeals has held similarly, stating that if "the facts do suggest two reasonable... inferences... the substantial evidence standard does not allow us to reject the Board's 'choice between two fairly conflicting views.' Id.; *citing* NLRB v. Stor-Rite Metal Prods., Inc., 856 F.2d 957, 964 (7th Cir.1988) (*quoting* Stokely-Van Camp, Inc. v. NLRB, 722 F.2d 1324, 1328 (7th Cir.1983)). This precedent provides for a safety valve that allows the appeals court to carefully review credibility determinations to ensure they comport with

the evidence in the case, while safeguarding the deference due to a reviewing an ALJ's physical observance of the witnesses and testimony in a case.

In this case, the ALJ's ruling, which held that Mr. Woodworth's notice to the Agency that he would be exercising his return rights preceded the Agency's decision not extend his tour, was erroneous and was not supported by substantial evidence. Substantial evidence means "more than a mere scintilla" and "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Suramerica de Aleaciones Laminadas, C.A. v. United States, 44 F.3d 978, 985 (Fed. Cir.1994) (quoting Consol. Edison Co. v. Nat'l Labor Relations Bd., 305 U.S. 197, 229 (1938)). "[T]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." Id.

Since there was no record evidence that Mr. Woodworth provided the Agency notice that he would be exercising his return rights prior to the Agency's decision not extend his tour, the ALJ was presented with the conflicting testimony of the Mr. Woodworth and the Agency on this issue. The ALJ was at least presented with two reasonable inferences in this instance, and a decision as to whether Mr. Woodworth's testimony, which conflicted with management's testimony, was correct and supported by substantial evidence. Ultimately, the ALJ chose not to credit Mr. Woodworth's statements. However, even accepting the ALJ's credibility determination, it is clear that the evidence still does not support his determination. Mr. Woodworth did not exercise his return rights, until

December 18, 2000, when he advised the Agency of his intentions to exercise his return rights to Port Hueneme. Moreover, the Rita email, *supra*, clearly shows that Mr. Rita had already made his decision not to extend Mr. Woodworth's tour and states that there were previous discussions regarding Mr. Woodworth's tour. Moreover, Mr. Rita even discussed a possible retaliation claim in the Rita email, *supra*, showing that Mr. Woodworth's protected activity was a consideration in its decision. As such, there is absolutely no evidence supporting a finding that the Agency's actions were based on Mr. Woodworth exercising his return rights. Since Mr. Woodworth's determination came after Mr. Rita made his determination, it is likely if not certain that the Agency advised him that his tour would not be extend.

Thus, the ALJ was at least presented with two inferences on the testimony, but the inferences were not both fair inferences because inferring that the Agency's version of events was correct, ran contrary to the substantial evidence in the case. NLRB v. Stor-Rite Metal Prods., Inc., *supra*. Thus, the ALJ essentially rested the entire case upon a credibility determination between Mr. Woodworth and management when no credibility determination was necessary, and chose to believe management's version of events in direct contravention of and without resolving the substantial conflicting direct evidence in the case. As such, the Federal Circuit has issued a ruling contrary to its own precedent in Augusta Bakery Corp. Augusta Bakery Corp, *supra*.

The Seventh Circuit has held that when "the facts do suggest two reasonable... inferences... the

substantial evidence standard does not allow us to reject the Board's 'choice between two fairly conflicting views.'" Id.; *citing* NLRB v. Stor-Rite Metal Prods., Inc. 856 F.2d 957, 964 (7th Cir.1988); *quoting* Stokely-Van Camp, Inc. v. NLRB, 722 F.2d 1324, 1328 (7th Cir.1983). Although this ruling holds that the court of appeals may not reject a lower court's decision between two reasonable inferences, it necessarily follows that the court of appeals is permitted to reject a board's choice between two conflicting views if one view is not "fair," which means to say, supported by substantial evidence. Id. The Federal Circuit's ruling in this appeal runs contrary to this precedent, and represents a split in the Federal Circuit's analysis of its own precedent and a split between the Federal Circuit's precedent with the Seventh Circuit's. As the substantial evidence in Mr. Woodworth's appeal supported his claim of retaliation for protected whistleblowing activity, the Court of Appeals must be reversed, and this split in precedent resolved.

CONCLUSION

This petition should be granted because the Court of Appeals for the Federal Circuit has affirmed a decision that is unsupported by the Whistleblower Protection Act, is violative of the first amendment, and has a chilling effect on whistleblowing activity. Additionally, the petition should be granted to determine whether whistleblower protection act retaliation analysis should mirror Title VII retaliation analysis. Moreover, at a bare minimum, the ruling is in direct conflict with the relevant decisions of this Court and has the potential to create a conflict in the circuits. Wherefore, Petitioner respectfully requests this Court

to grant this petition and reverse the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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2009-3063

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KENNETH L. WOODWORTH, Petitioner,

v.

DEPARTMENT OF THE NAVY, Respondent.

July 22, 2009, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

ON APPEAL from the Merit Systems Protection Board. In CASE NO(S). SE1221040166-B-1.

COUNSEL: Frank DeMelfi, Melville Johnson, P.C., of Atlanta, Georgia, argued for petitioner. With him on the brief was Christopher D. Vaughn.

Hillary A. Stern, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent. With her on the brief were Michael F. Hertz, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Todd M. Hughes, Deputy Director.

JUDGES: NEWMAN, MAYER, and PROST, Circuit Judges.

OPINION

Judgment

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam.

AFFIRMED. *See* Fed. Cir. R. 36.

DATED July 22, 2009

DOCKET NUMBER SE-1221-04-0166-B-1

MERIT SYSTEMS PROTECTION BOARD

KENNETH L. WOODWORTH,
Appellant,

v.

DEPARTMENT OF THE NAVY, Agency.

November 7, 2008

COUNSEL: Christopher D. Vaughn, Esquire and Bobbie L. Hoye, Esquire, Melville Johnson, P.C., Atlanta, Georgia for appellant.

Charles E. Molden, APO/FPO (Japan), for the agency.

Before

Neil A. G. McPhie, Chairman

Mary M. Rose, Vice Chairman

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge.* We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of

the Code of Federal Regulations, section 1201.115 (5 C.F.R. Sec. 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. Sec. 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision is this matter. 5 C.F.R. Sec. 1201.113

Footnote

*The agency's motion to dismiss the petition for review as untimely is DENIED because the petition was timely filed. 5 C.F.R. Sec. 1201.4(1).

DOCKET NUMBER SE-1221-04-0166-B-1

MERIT SYSTEMS PROTECTION BOARD

KENNETH L. WOODWORTH,
Appellant,

v.

DEPARTMENT OF THE NAVY, Agency.

April 17, 2008

COUNSEL: Christopher D. Vaughn, Esquire and Bobbie L. Hoye, Esquire, Melville Johnson, P.C., Atlanta, Georgia for appellant.

Charles E. Molden, APO/FPO (Japan), for the agency.

BEFORE
Joseph E. Clancy
Administrative Judge

INITIAL DECISION

INTRODUCTION

The Board remanded this Individual Right of Action (IRA) appeal for a hearing on the merits, having found that appellant had set forth non-frivolous allegations of Board jurisdiction. See *Woodworth v. Dep't of the Navy*, 105 M.S.P.R. 456, 466 (2007). For the reasons set forth below, appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

The background of this case is set forth in the Board's Opinion and Order cited above, and will not be fully repeated here. In remanding this matter, the Board directed that a determination be made as to whether the agency's decision not to extend appellant's overseas tour of duty constituted a personnel action under 5 U.S.C. §2302(a)(2)(A). In that regard, I find that such a decision is closely akin to an agency's failure to renew a temporary appointment, a matter which the Board has determined to constitute a failure to take a "personnel action" for purposes of an IRA appeal. See *Kern v. Dep't of Agric.*, 48 M.S.P.R. 137, 140 (1991). I therefore find that appellant has met his burden of proof as to that particular issue. See *Jessup v. Dep't of Homeland Sec.*, 107 M.S.P.R. 1, 7, 2007 M.S.P.B. 225 (2007).

Given the Board's prior determinations that appellant set forth non-frivolous allegations that he made a protected disclosure regarding missile blast residue, and that said disclosure could have been a factor in the agency's failure to extend his overseas tour, I proceeded to schedule a hearing on the merits of appellant's case. Said hearing was conducted by video-conference over a period of three days with witnesses in the United States as well as Japan. n1

Appellant had initially alleged to the Office of Special Counsel (OSC) that on March 5, 2001, the Commanding Officer at the U.S. Naval Ship Repair Facility (SRF) in Yokosuka, Japan, Captain David Armstrong, n2 had failed to offer him a tour extension in retaliation for his having made prior protected disclosures. (Initial Appeal File, Tab 1). This claim formed the framework for

appellant's IRA appeal. After the agency submitted evidence showing that on December 18, 2000, appellant had noted his intent to exercise his return rights to a position at Port Hueneme, California, appellant claimed that the decision not to offer him a tour extension had in fact been made at an October 16, 2000 meeting of the Position Management Board (PMB). (Initial Appeal File, Tab 11). Appellant alleged that, following this meeting, his immediate supervisor, Ed Kreuger, had informed him of the decision not to extend his tour, and that this knowledge prompted his December 18, 2000 decision to exercise his return rights in August of 2001. (Initial Appeal File, Tab 13).

I approved as witnesses for the hearing five individuals who attended the October 16, 2000 PMB meeting at which appellant alleged the decision was made not to offer him a tour extension. Those individuals were: Captain Armstrong, his Executive Officer, Captain Stephanie Douglas; n3 the Director of Combat Systems, Peter Rita; a Management Analyst, Ms. Merle Dixon; and Mr. Allen Tanabe. The first four of these individuals all testified that appellant's tour extension was not even discussed at the meeting in question, and the documentation reflecting the agenda of that meeting clearly supported said testimony. (Original Appeal File, Tab 14). After hearing the testimony of those witnesses, appellant's representative decided not to call Mr. Tanabe to testify.

The overwhelming weight of the consistent, corroborated and credible testimony, as well as the documentary evidence, leads me to find that appellant's claim that the decision not to offer him a tour extension was made at the October 16, 2000 PMB meeting is

totally without merit. Indeed, as will be addressed below, that decision was made only after appellant had decided to exercise his return rights, and was delayed even further until it was learned that Port Hueneme would not extend appellant's return rights.

Mr. Krueger was not present at the PMB meeting on October 16, 2000. In addition, Mr. Krueger died in August of 2002, nearly two years before appellant first raised the issue of his alleged conversation with Mr. Krueger. At the hearing before me, appellant testified that this "conversation" consisted of him asking Mr. Krueger if his tour would be extended, and Mr. Krueger answering "no." Although the decision as to whether to offer appellant a tour extension rested solely with Captain Armstrong, three management levels above Mr. Krueger, appellant stated that he made no effort to verify or confirm that the "no" response by Mr. Krueger was accurate. I find this explanation to be inherently incredible, and this factor, together with appellant's failure to mention his alleged conversation with Mr. Krueger until after his death and after the agency had pointed out the problem with his initial allegation, does not reflect well on appellant's credibility. See *Hillen v. Dep't of Army*, 35 M.S.P.R. 453, 458 (1987). n4

Moreover, the evidence reflects that appellant was clearly influenced by factors other than his alleged conversation with Mr. Krueger in deciding to exercise his return rights. Appellant's entitlement to on-base housing was scheduled to expire in April of 2001, at which time he would have been required to locate housing for his family on the Japanese economy, a difficult and expensive proposition. Appellant's son was

graduating from a local high school in June of 2001 and, perhaps most importantly, there was doubt as to whether Port Hueneme would grant another extension of his return rights to his former position in the United States.

In addition, the agency has shown by clear and convincing evidence that Captain Armstrong's decision not to offer appellant another tour extension would have been the same regardless of appellant's protected activity. As previously noted, appellant initiated the process to return to Port Hueneme by exercising his return rights. The testimony of Captain Armstrong and Mr. Rita, supported by records of e-mail traffic between them and other evidence in the record, clearly showed that Captain Armstrong did not make a decision until December 20, 2000 that he would not offer appellant another tour extension. (Agency Hearing Exhibits 2 & 3; First Remand File, Tab 12, Exhibit 4). Captain Armstrong aided in gaining approval for appellant's extension of on-base housing until August of 2001, and he did not ultimately advise appellant of the absence of a tour extension offer until after it was determined that Port Hueneme would not grant a further extension of his return rights. Accordingly, I find that Captain Armstrong's decision would have been the same even absent appellant's whistleblowing activity and that, in fact, that decision had nothing to do with said activity. See *Woodworth v. Dep't of the Navy*, 105 M.S.P.R. at 465. Under the circumstances, I find that appellant is entitled to no relief.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD:

/S/

Joseph E. Clancy

Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on May 22, 2008, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board

Merit Systems Protection Board

1615 M Street, NW.,

Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (see 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is

the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. See 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals

for the Federal Circuit

717 Madison Place, NW.

Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website,

www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

Footnotes

n1 The 14-hour time difference between Japan and the U.S. required multiple hearing days due to the logistical problems involved therein.

n2 He is now retired, but I will continue to refer to him as Captain Armstrong.

n3 Captain Douglas is the current Commanding Officer of SRF Yokosuka.

n4 Subsequent to the hearing, appellant attempted to clear up "any discrepancies" in his hearing testimony by sending me a copy of an e-mail wherein he essentially tried to rehabilitate his own testimony. (Current Remand File, Tab 28). I have disregarded the information in this unsolicited submission.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final

decision. You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit

717 Madison Place, N.W.

Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer

Clerk of the Board

2009-3063

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KENNETH L. WOODWORTH, Petitioner,

v.

DEPARTMENT OF THE NAVY, Respondent.

October 9, 2009, Decided

October 9, 2009, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 16, 2009.

Docket No. SE-1221-04-0166-M-1

MERIT SYSTEMS
PROTECTION BOARD

Kenneth L. Woodworth,
Appellant,

v.

Department of the Navy,
Agency.

April 10, 2007

COUNSEL: Richard A. Lowell, Esquire, Lisle, Illinois, for the appellant.

Terri C. Duenas, FPO, APO/FPO Pacific, for the agency.

OPINION BY: ROBERTS, JR.

BEFORE

Neil A. G. McPhie, Chairman

Mary M. Rose, Vice Chairman

Barbara J. Sapin, Member

OPINION AND ORDER

The appellant has filed a petition for review of the initial decision dismissing his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, FIND that the appellant

has made non-frivolous allegations sufficient to establish Board jurisdiction over the appeal, and REMAND the appeal for adjudication on the merits.

BACKGROUND

Procedural History

In a complaint filed with the Office of Special Counsel (OSC), the appellant alleged that the commanding officer of the U.S. Naval Ship Repair Facility in Yokosuka, Japan (hereinafter "commanding officer"), engaged in reprisal for whistleblowing. *Woodworth v. Department of the Navy*, 98 M.S.P.R. 133, P2 (2005) (*Woodworth* I). The appellant alleged that he made protected disclosures to the Merit Systems Protection Board and to the commanding officer. *Id.* The reprisal allegedly occurred on March 5, 2001, when the commanding officer notified the appellant that he could not extend his overseas duty. *Id.* After OSC terminated its inquiry into the complaint, the appellant timely filed the instant appeal. *Id.*

The agency filed a motion to dismiss the appeal, asserting that on December 18, 2000, the appellant voluntarily notified the agency of his desire to exercise his return rights to his position at the Naval Surface Warfare Center in Port Hueneme, California. *Id.*, ¶ 3. The agency also presented a series of e-mail communications among officials in Japan and officials in California that occurred between December 2000 and January 2001. *Id.* In these e-mails, the officials in Japan indicated that they wished to offer the appellant an extension of his overseas duty and asked the officials in California if they would extend the appellant's return

rights for another 24 months. *Id.* The officials in California initially agreed to grant a two-year extension; however, in January 2001, they rescinded the extension. *Id.* In a February 2001 memorandum, the agency referenced the appellant's December 18 memorandum and confirmed his intent to exercise his return rights. *Id.* On March 5, 2001, the agency sent the appellant formal notification that his overseas tour was to expire. *Id.* The agency reassigned the appellant to his position in California at the same grade and basic pay. *Id.*

The administrative judge issued an order to show cause to the appellant regarding the jurisdictional issue. *Id.*, ¶ 4. In response, the appellant made unsworn allegations that the officials in Japan decided not to extend his overseas tour during an October 16, 2000 meeting. *Id.* According to the appellant, after the meeting, Mr. Krueger, the appellant's first-level supervisor, informed the appellant of the decision. *Id.*

In reply, the agency produced the October 16, 2000 meeting minutes showing that Mr. Krueger, who had since died, did not attend the meeting and that the appellant's position was not discussed at the meeting. *Id.*, ¶ 5. The appellant continued to maintain that the decision was communicated to him in October 2000, even though the October 16 meeting minutes did not reflect such a decision. *Id.* In a one-sentence affidavit, the appellant stated, "[I]t was communicated to me by Mr. Ed Krueger in October of 2000 that I was not going to get an extension of my overseas tour of duty for another two years." *Id.* The administrative judge concluded that the appellant's belated attempt to amend his claim by raising Mr. Krueger's previously unmentioned statement was insufficient to rise to the

level of a non-frivolous jurisdictional allegation and dismissed the appeal for lack of jurisdiction. *Id.*

On PFR, the Board issued an Opinion and Order affirming the initial decision on alternative grounds. The Board reasoned that officials in California, who had no knowledge of the appellant's alleged disclosures and who declined to extend the appellant's return rights, were ultimately responsible for the decision not to extend the appellant's overseas tour. *Id.*, ¶ 8. The appellant's brief affidavit regarding Mr. Krueger's statement did not indicate which official in Japan was responsible for the alleged October action and whether that official was aware of the appellant's alleged whistleblowing activities. *Id.* For these reasons, the Board concluded that the appellant had not made a non-frivolous allegation that his disclosures were a contributing factor in the decision not to extend his return rights. *Id.*

The appellant filed a petition for review with the U.S. Court of Appeals for the Federal Circuit. While the petition was pending, the Department of Justice, on behalf of the agency, filed an unopposed motion for remand, expressing concern that the Board "may have failed to distinguish between two [distinct and independent] personnel actions"--the extension of the overseas tour, which was within the independent authority of the officials in Japan, and the extension of return rights, which was within the independent authority of the officials in California. *Woodworth v. Department of the Navy*, 101 M.S.P.R. 560, P8 (2006) (hereinafter *Woodworth* II). The court granted the motion, noting that the Board "may have failed to distinguish between two different personnel actions" and, thus, the appellant "may be entitled to further

consideration of some of his allegations before the [Board]." *Id.*

Upon remand, the Board issued an Opinion and Order noting that the parties apparently had agreed that the extension of the overseas tour and the extension of return rights are separate decisions or personnel actions within the independent authority, respectively, of the officials in Japan and the officials in California. *Id.*, ¶ 10. Acknowledging that the opinion in *Woodworth* I was largely based on an implicit finding that the two decisions were interdependent, the Board overruled *Woodworth* I. *Id.* The Board further reasoned that this clarified fact was not considered by the administrative judge and appeared to be material in determining whether the appellant raised a non-frivolous allegation of whistleblower reprisal. *Id.* Accordingly, the Board remanded the appeal to allow the parties an additional opportunity to submit evidence and argument on jurisdiction. *Id.*, ¶¶ 10-11.

The Proceeding on Remand

Upon remand, the administrative judge afforded the parties an opportunity to submit additional evidence and argument regarding the jurisdictional issue. Court Remand File (CRF), Tab 6. In response to the administrative judge's order, the appellant presented a December 19, 2000 memorandum from M. Dixon to authorities in Yokosuka ("the Dixon memo"). CRF, Tab 8 at 2. The subject of the memorandum was designated, "Request for invitation to extend overseas tour beyond nine (9) years for Mr. Kenneth L. Woodworth," and the memorandum referenced the October 16, 2000, meeting. *Id.* The memorandum stated that the "authority to approve extension of foreign

overseas employment beyond nine years has been delegated to the Commanding Officer, U.S. Naval Ship Repair Facility, Yokosuka." *Id.* (emphasis in original). The memorandum asked the recipient to advise whether he wished to retain the appellant and, if so, to provide a brief statement explaining the need for the appellant's continued service. *Id.* In response, Peter F. Rita checked the option to request that the appellant's overseas tour not be extended. *Id.* at 3. On December 21, 2000, an official, allegedly the commanding officer, concurred in that request; however, the signature of the concurring official is illegible. *Id.*; CRF, Tab 7 at 7. The appellant emphasized that the October 16, 2000 meeting minutes show M. Dixon was in attendance. CRF, Tab 7 at 15 n.4; Initial Appeal File (IAF), Tab 12, Att. 1. The appellant maintained that this memorandum indicated that the agenda of the October 16, 2000 meeting included the extension of his overseas tour of duty, as he had averred. CRF, Tab 7 at 15.

As previously discussed, the record also contains a memorandum, dated December 18, 2000, sent from the appellant to the housing officer via the commanding officer. IAF, Tab 9, Subtab 4h. In this memo, the appellant stated, "I am requesting an extension of four (4) months of on base housing . . . from April 2001, to end of my travel agreement in August 2001. At which time it is my intention to exercise my return rights to [Port Hueneme]." *Id.* The appellant maintained that he sent this memorandum only after Mr. Krueger informed him of the October 16, 2000 decision not to extend the appellant's overseas tour of duty. CRF, Tab 7 at 6-7.

The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. The

administrative judge concluded that the Dixon memo "directly contradicts the appellant's assertion that the agency had already decided not to offer another tour extension to appellant when he submitted his December 18 notice of intent to exercise his return rights." Initial Decision (ID) at 2. According to the administrative judge's reasoning, the Dixon memo indicates that no such decision had been made, as it advises the commanding officer to decide whether to extend the appellant's overseas tour. *Id.* at 2-3. As to Mr. Krueger's statement, the administrative judge reasoned that "all evidence submitted by appellant demonstrates that such a statement was simply not true." *Id.* at 3. The administrative judge noted that the appellant made no effort to determine whether Mr. Krueger's statement was true, and the appellant never referenced any other communication from anyone above his immediate supervisor advising him that his tour would not be extended. *Id.* He concluded that the determination not to offer the appellant a third tour extension was the logical extension of the appellant's December 18, 2000 notice of his intent to exercise his return rights. *Id.*

The appellant has filed a timely petition for review in which he argues that the administrative judge improperly weighed the evidence in determining whether there was a non-frivolous allegation that the commanding officer decided not to extend the appellant's tour because of his whistleblowing activities. Petition for Review File (PFRF), Tab 1 at 25-35. The appellant complains that the administrative judge failed to consider all the reasonable inferences he could draw from the Dixon memo and the other evidence of record and that the administrative judge

failed to consider any inferences favorable to the appellant's assertions that may be drawn from the Dixon memo. *Id.* at 36. He asserts that the Dixon memo supports his allegation that the extension of his overseas tour was discussed during the October 16, 2000 meeting. *Id.* at 36-40. The appellant maintains that the administrative judge erred in treating the agency's evidence as dispositive, where the agency's evidence merely raised factual contradictions to the appellant's evidence. *Id.* at 40-42. Finally, he asserts that he raised non-frivolous allegations that he made protected disclosures. *Id.* at 42-49.

The agency filed a motion for an extension of time to file its response to the appellant's petition for review, which was denied. PFRF, Tabs 3-4. The agency then filed an untimely response to the appellant's petition for review and renewed its motion for an extension of time. PFRF, Tabs 5-6. In its motion, the agency explained that its response was untimely because the agency representative was performing a deputy director's duties and because the agency representative was responsible for multiple appeals with various deadlines. PFRF, Tab 6 at 1. The agency representative further stated that the Board's acknowledgement order was misplaced and was found one week after the deadline for filing a response had passed. *Id.* at 2. We find that the agency has not shown good cause for its untimely response and DENY the motion to waive the time limit. We therefore have not considered the agency's response in our decision. *See, e.g., Baker v. U.S. Postal Service*, 86 M.S.P.R. 349, P6 (2000) (determining that the agency had not shown good cause where it failed to give due consideration to and misplaced a Board notice); *Wojcicki v. Department of the Air Force*, 72

M.S.P.R. 628, 632 n.1 (1996) (finding that the agency had not shown good cause for its untimely filing where it explained that the "press of other work" delayed preparation of its response).

ANALYSIS

The Board has jurisdiction over an IRA appeal if the appellant has exhausted his or her administrative remedies before OSC and makes non-frivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, P12 (2002). Non-frivolous jurisdictional allegations supported by affidavits or other evidence confer Board jurisdiction. *Dick v. Department of Veterans Affairs*, 290 F.3d 1356, 1361 (Fed. Cir. 2002), *overruled on other grounds, Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006) (en banc). The jurisdictional question must be determined based upon the written submissions. *Spencer v. Department of the Navy*, 327 F.3d 1354, 1356 (Fed. Cir. 2003).

The record indicates that the appellant exhausted his administrative remedies with OSC. Attached to the petition for appeal were the appellant's submissions to OSC, including the form on which he submitted his complaint to OSC and several letters sent in response to OSC's inquiries. IAF, Tab 1, Att. C. He maintained in these documents that the agency took the alleged covered personnel action in reprisal for the alleged protected disclosures, both of which allegations we find

in the discussion below to be non-frivolous. *See id.* at 9, 12-13; *infra* ¶¶ 16-18. Finally, the record includes a letter from OSC notifying the appellant that it had terminated its inquiry into his allegations and that he may seek corrective action with the Board. IAF, Tab 1, Att. D. Accordingly, we find that the appellant has exhausted his administrative remedies with OSC.

A protected disclosure includes a disclosure of information which the employee reasonably believed evidenced a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); *Lachance v. White*, 174 F.3d 1378, 1380-81 (Fed. Cir. 1999); *Rusin*, 92 M.S.P.R. 298, ¶18. To establish that he had a reasonable belief that his disclosure met the criteria of 5 U.S.C. § 2302(b)(8), an appellant need not prove that the condition reported established a substantial and specific danger to public health and safety. *Wojcicki*, 72 M.S.P.R. at 633. Rather, an appellant must show that a reasonable person in his position would believe that the reported matter evidenced a substantial and specific danger. *Id.* at 633-34. Furthermore, a danger may be substantial and specific even though the perceived danger was to a limited number of government personnel and not to the general public at large. *Id.* at 634.

Here, the appellant alleged that on either June 27, 2000 or July 27, 2000, he informed the commanding officer and the Board -- apparently in the context of a Board appeal -- that workers who disassembled missiles were exposed to missile blast residue. IAF, Tab 1, Att. A at 6; Att. C at 8; Att. E at 1. According to the appellant, the missile blast residue contained "chemical

elements and metal compounds which are harmful caustic, toxic, irritants and carcinogens." IAF, Tab 1, Att. C at 12 (punctuation as in the original). He further alleged that his exposure to missile blast residue caused skin, eye, and nose irritation and that he suffered from many sinus infections which he believed were caused by exposure to the missile blast residue. *Id.* We find that, under these facts, the appellant has made a non-frivolous allegation that a reasonable person in his position would believe that the situation he reported constituted a substantial and specific danger to public health and safety. *See Wojcicki*, 72 M.S.P.R. at 633-34. Accordingly, the appellant has made a non-frivolous allegation that he engaged in at least one protected whistleblower activity. *See Greenspan v. Department of Veterans Affairs*, 94 M.S.P.R. 247, P14 (2003), *reversed on other grounds*, 464 F.3d 1297 (Fed. Cir. 2006).[1]

Finally, the appellant must also make a non-frivolous allegation that his disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). The parties stipulated before the Federal Circuit that the appeal involved two personnel actions: the extension of the overseas tour and the extension of return rights. *Woodworth*, 101 M.S.P.R. 560, P8. The extension of an overseas tour is not explicitly listed as a "personnel action" under 5 U.S.C. § 2302(a). The question then becomes, however, whether the decision not to extend an overseas tour constitutes "any other significant change in duties, responsibilities, or working conditions" under 5 U.S.C. § 2302(a)(2)(A)(xi). Since one may infer that the decision not to extend the appellant's overseas tour constituted a significant change in the

appellant's duties, responsibilities, or working conditions, we find that the appellant has made a non-frivolous allegation of a covered personnel action.

Under the knowledge/timing test, an appellant may make a non-frivolous allegation that a disclosure was a contributing factor in a personnel action if he alleges that the official taking the action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *Johnson v. Department of Defense*, 95 M.S.P.R. 192, P8 (2003), *aff'd*, 97 F. App'x 325 (Fed. Cir. 2004). Here, the earliest date on which the appellant alleged that he made a protected disclosure to his commanding officer was June 27, 2000. IAF, Tab 1, Att. A at 6; Att. C at 8, 13. The notification of expiration of overseas tour the appellant received from the commanding officer is dated March 5, 2001, just over eight months later. IAF, Tab 1, Att. G. We find that, under these facts, the appellant has made a non-frivolous allegation that his disclosures were contributing factors in the personnel action. *See Powers v. Department of the Navy*, 97 M.S.P.R. 554, ¶18 (2004) (finding that the appellant made a non-frivolous allegation that his disclosure was a contributing factor to the personnel action where the agency's action was made approximately nine months after the appellant's disclosure).

Upon remand, however, the appellant will bear the burden of proving by a preponderance of the evidence that he made a protected disclosure, that subsequent to his protected disclosure he was subjected to a covered personnel action, and that the disclosure was a contributing factor in the personnel action. *See Smart v.*

Department of the Army, 98 M.S.P.R. 566, P12, *aff'd*, 157 F. App'x 260 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1663 (2006). If the appellant makes this showing, the Board will order appropriate corrective action unless the agency establishes by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *See* 5 U.S.C. § 1221(e); *Smart*, 98 M.S.P.R. 566, ¶12. Thus, on remand, the appellant should be prepared to present evidence and argument to support his allegation that the decision not to extend his overseas tour was a personnel action under 5 U.S.C. § 2302(a)(2)(A)(xi). Finally, we note that, even if the administrative judge concludes that the decision not to extend the overseas tour is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(xi), the e-mails between officials in Japan and officials in California may offer some evidence to show that the decision not to extend the appellant's return rights influenced the agency's decision not to extend his overseas tour. IAF, Tab 9, Subtabs 4E-4F. Thus, the administrative judge may consider whether the California officials' decision not to extend the appellant's return rights influenced the decision not to extend the appellant's overseas tour. This factual determination is relevant to the issues of whether the appellant has proved by a preponderance of the evidence that the disclosure was a contributing factor in the agency's personnel action and whether the agency can prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *See Smart*, 98 M.S.P.R. 566, ¶12.

The administrative judge reasoned that the appellant failed to make a non- frivolous allegation that a causal connection existed between any protected

disclosures and the agency's determination not to offer a tour extension. ID at 3. Specifically, the administrative judge determined that the Dixon memo contradicted the appellant's assertion that the agency decided during an October 16, 2000 meeting not to extend his overseas tour, as the memo indicated that the agency had not yet made such a decision as of December 19, 2000. *Id.* at 2-3. Since this is not the only inference that may be drawn from the Dixon memo, the administrative judge's reasoning may be more appropriately applied to a determination of whether the appellant can prove by a preponderance of the evidence that his disclosure was a contributing factor in taking the personnel action.[2]

For the reasons set forth above, we find that the appellant has made non- frivolous allegations of Board jurisdiction. Accordingly, this appeal must be remanded for a hearing on the merits.

ORDER

We REMAND this appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.

Footnotes

n1 The appellant's attachments to his petition for appeal in which he outlines his alleged protected

disclosures are rather confusing. For example, the appellant alleges that he made disclosures on June 27, 2000; July 27, 2000; December 29, 2000; and January 2001. IAF, Tab 1, Att. A at 6; Att. C at 8. Moreover, it is not entirely clear which of the alleged disclosures were made to the commanding officer and which disclosures were made to the Board. IAF, Tab 1, Atts. C-D. We further note that the record indicates the appellant's filing with the Board is captioned "U.S. Merit System [sic] Protection Board Appeal." IAF, Tab 1, Att. E at 2. Filing an appeal with the Board is not a protected disclosure under 5 U.S.C. § 2302(b)(8). *See Martin v. Department of the Air Force*, 73 M.S.P.R. 574, 578 (1997).

n2 We note that the appellant initially alleged that the personnel action at issue here occurred on March 5, 2001. IAF, Tab 1 at 1 & Att. C at 8, 13. The agency then presented evidence to support its contention that the appellant expressed his intention to exercise his return rights on December 18, 2000, before the agency had decided whether to extend his overseas tour. *Woodworth*, 98 M.S.P.R. 133, P3. Only after the agency presented this evidence did the appellant allege that Mr. Krueger, now deceased, informed the appellant of the decision not to extend his overseas tour and that this decision was made during the October 16, 2000 meeting. *Id.*, P 4. The appellant's last-minute change of his allegation is more properly considered in assessing the appellant's credibility than in determining whether the appellant has made a non-frivolous allegation of Board jurisdiction. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (to resolve credibility issues, an administrative judge must consider factors including, *inter alia*, a witness's prior inconsistent

statement by the witness and the contradiction of the witness's version of events by other evidence or its consistency with other evidence).